

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

AT&T Corp. Petition Pursuant to 47 U.S.C.)	
Section 160(c) of the Communications Act)	WC Docket No. 03-256
for Forbearance from Enforcement of)	
Section 204(a)(3) of the Communications Act)	

MCI COMMENTS

WorldCom, Inc. d/b/a MCI (MCI) hereby submits its comments on the Petition for Forbearance filed by AT&T Corp. (AT&T) on December 3, 2003. MCI fully supports AT&T's request that the Commission forbear from enforcing the "deemed lawful" provision of section 204(a)(3) of the Act. AT&T's petition demonstrates that continued enforcement of the deemed lawful provision is not only unnecessary to ensure just and reasonable rates, protect consumers, and promote the public interest, but is in fact antithetical to those objectives.

Indeed, Section 204(a)(3)'s deemed lawful provision all but guarantees that customers will be subjected to rates, terms, and conditions that are unjust and unreasonable or unreasonably discriminatory. Prior to the adoption of section 204(a)(3) of the Act, a customer could be entitled to damages if it could demonstrate in a complaint proceeding that LEC rates, terms, and conditions that the Commission had allowed to go into effect were in fact unlawful. Now, however, customers could be faced with paying unjust and unreasonable rates for months or even years until a complaint is adjudicated, with no possibility of redress.

Pre-effective review is not sufficient to protect customers. As an initial matter, the Commission has not modified its suspension standard to recognize the impact of the “deemed lawful” provision. As was the case prior to the adoption of section 204(a)(3), it is the Commission’s policy that it will not suspend tariff transmittals unless they raise “significant” or “substantial” questions of lawfulness. By employing such a rigorous suspension standard, the Commission all but ensures that it will allow rates, terms, or conditions that are unjust and unreasonable or unreasonably discriminatory to go into effect.

The probability that the Commission will allow unjust and unreasonable, or unreasonably discriminatory, rates, terms, or conditions to go into effect is compounded by section 204(a)(3)’s short notice periods. Not only do customers only have five business days in which to review and oppose a LEC tariff transmittal, but – equally importantly – the Commission has only one business day after receipt of the LEC’s reply to petitions to suspend and investigate in which to assess whether the transmittal should be suspended and investigated.

The risk that the “deemed lawful” provision of section 204(a)(3) poses to customers is particularly acute for customers of rate of return LECs. As AT&T discusses, the D.C. Circuit found in the recent ACS case that the “deemed lawful” provision of section 204(a)(3) precludes the Commission from awarding damages for overearnings for the period covered by the LEC’s unsuspended streamlined tariffs.¹ The ACS decision raises serious questions about whether rate of return regulation is compatible with section 204(a)(3).

¹ ACS of Anchorage v FCC, 290 F.3d 403 (D.C. Cir. 2002) (ACS).

In rate of return regulation, the Commission prescribes a rate of return that “represents a proclamation by the Commission that earnings in excess of the prescribed rate are unlawful.”² As the D.C. Circuit has repeatedly held, a rate of return prescription has the force of law and a violation of the rate of return prescription may therefore be treated as a per se violation of the requirement of the Communications Act that a common carrier maintain just and reasonable rates.³ Consistent with that determination, the Commission has consistently held that carrier earnings over and above the prescribed rate of return plus a buffer are unlawful.⁴

The complaint process, including the potential award of damages, has long been central to the Commission’s enforcement of its rate of return prescriptions. If a carrier’s earnings reports showed that the carrier had overearned, customers could file a complaint pursuant to section 206-209 of the Communications Act. Consistent with the purpose of the rate of return prescription, the Commission would find that the carrier had violated section 201 of the Act by earning in excess of the prescribed rate of return and would order the carrier to disgorge earnings in excess of the prescribed rate of return (plus buffer).⁵

It remains Commission policy that rate of return prescriptions shall be enforced through the potential award of damages in the complaint process. The Commission reaffirmed that policy in 1995,⁶ and did not contemplate in the 1997 Tariff Streamlining Order that the deemed lawful provision of section 204(a)(3) would undercut

² New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1392 (D.C. Cir. 1987)

³ MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1413 (D.C. Cir. 1995)

⁴ MCI Telecommunications Corp. v. Pacific Northwest Bell et al., Memorandum Opinion and Order, 5 FCC Rcd 216, 222 (1990) (MCI).

⁵ See, e.g., MCI.

⁶ Amendment of Parts 65 and 69 of the Commission’s Rules to Reform the Interstate Rate of Return

enforcement of rate of return prescriptions. Indeed, in the GCI v. ACS order remanded by the D.C. Circuit in ACS, the Commission stated its view that “neither Congress nor the Commission intended the drastic change to rate-of-return regulation that ATU argues for here,”⁷ i.e., barring damage awards even in the event of overearning.

The Commission should grant AT&T’s forbearance petition in order to ensure that its rate of return prescriptions remain enforceable, and thus ensure that customers of rate of return carriers pay just and reasonable rates. Pre-effective review by itself cannot ensure that a LEC’s rates comply with the rate of return prescription, in part for the reasons discussed above and in part because rate of return carrier rate-setting involves complex estimates of projected costs and demand that cannot be fully evaluated in advance. As AT&T demonstrates, the rate of return LECs have in fact overearned by a substantial margin during the most recent monitoring period.⁸

Represcription and Enforcement Process, Report and Order, 10 FCC Rcd 6788, 6847-6850 (1995).

⁷ General Communications, Inc. v. Alaska Communications Systems Holdings, Inc., EB-00-MD-016, Memorandum Opinion and Order, released January 24, 2001, at ¶ 59.

⁸ AT&T Petition at 11.

For the reasons stated herein, the Commission should grant AT&T's petition for forbearance.

Respectfully submitted,
WORLDCOM, INC. d/b/a MCI

/s/ Alan Buzacott

Alan Buzacott
1133 19th Street, N.W.
Washington, DC 20036
(202) 887-3204

January 30, 2004